

## REMARKS/ARGUMENTS

The above-identified patent application has been reviewed in light of the Examiner's Action dated June 24, 2009. In view of the amendments and arguments presented herein, Applicant respectfully submits that the claims are in condition for allowance.

Claims 1-25 have been rejected under 35 U.S.C. §112 as being indefinite. Claims 1, 2, 5, 6, 11-14, 16 and 18-21 have been rejected under 35 U.S.C. §102 as being anticipated by WIPO Patent Application Publication 95/04688 to Houzego et al. ("Houzego"). Claims 1, 2, 5, 6, 11-14 and 18-21 have been rejected under 35 U.S.C. §102 as being anticipated by U.S. Patent No. 5,714,186 to Nash et al., ("Nash"). Claims 3, 4 and 10 have been rejected under 35 U.S.C. §103 as being unpatentable over Houzego alone or in view of U.S. Patent No. 1,567,050 to Grieshaber ("Grieshaber"). Claims 7-9 and 22-25 have been rejected under 35 U.S.C. §103 as being unpatentable over Houzego in view of WIPO Patent Application Publication 99/54229 to Reichinger ("Reichinger"). Claims 15 and 17 have been rejected under 35 U.S.C. §103 as being unpatentable over Houzego in view of U.S. Patent No. 5,705,209 to Wright et al. ("Wright"). Claims 3, 4 and 10 have been rejected under 35 U.S.C. §103 as being unpatentable over Nash alone or in view of Grieshaber. Claims 7-9 and 22-25 have been rejected under 35 U.S.C. §103 as being unpatentable over Nash in view of Reichinger.

Claims 1-25 have been amended and are now pending.

### **Claim Rejections – 35 U.S.C. §112**

Claims 1-25 have been rejected as being indefinite. Accordingly, Claims 1-25 have been amended to address the Examiner's rejections, explanations related to the claim-specific amendments are provided below. Further, Figs. 3 and 4 have been amended to provide antecedent basis for the claims. No new matter is believed to have been added by these amendments.

Claim 1 has been amended to correct the antecedent basis issues pointed out by the Examiner. Additionally, the phase "reduced diameter" has been deleted from Claim 1 and "environment of the insert" has generally been amended to connote that that insert is initially located adjacent to a headspace of the container. Finally, the objected-to phrases

"small opening", "when it fills with liquid", "minimum volume" and "cavity in conjunction..." have been either deleted or corrected.

Claim 3 has been amended to include additional subject matter to describe the "partially covered boat" of lines 2-3.

Claim 4 has been amended to correct the antecedent basis issues identified by the Examiner.

Claim 6 has been amended to correct the antecedent basis issues identified by the Examiner and to indicate that the cavity has an opening in an upper surface as shown in the figures.

Claim 7 has been amended to correct the antecedent basis issues identified by the Examiner and to indicate that the cavity has an opening in an upper surface as shown in the figures. Further the phrases "relatively weak forces" and "opened by relatively weak forces in a gas and liquid-tight manner" has been deleted from the claim.

Claim 8 has been amended to clarify the nature of the partition.

Claim 9 has been amended to correct the antecedent basis issues identified by the Examiner. The amendments to Figs. 3 & 4 also address this rejection. In addition, the phrase "or a shape derived therefrom" has been deleted from the claim.

Claim 14 has been amended to delete the phrase "composed exclusively of". Claim 14 has also been amended to correct the antecedent basis issues identified by the Examiner.

Claim 15 has been amended to delete the phrase "weak bonded connections".

Claim 16 has been amended to correct the antecedent basis issues identified by the Examiner.

Claim 21 has been amended to remove the narrow range identified by the Examiner.

Claim 22 has been amended to only depend on Claim 7.

Claim 25 has been amended to delete the phrase "a minor nutrient".

Accordingly, in light of these amendments, and other amendments made to the claims to correct ambiguities and antecedent basis issues, withdrawal of this rejection based on 35 U.S.C. §112 is respectfully requested.

### **Claim Rejections – 35 U.S.C. §102 - Houzego**

Claims 1, 2, 5, 6, 11-14, 16 and 18-21 have been rejected as being anticipated by Houzego. "A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." Verdegaal Bros. v. Union Oil Co. of California, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). Applicant respectfully traverses this rejection as Houzego does not disclose each and every one of the elements claimed.

More specifically, it is noted that the Examiner has interpreted the phrase "environment of the insert" to mean the environment *inside* the inert. This interpretation is incorrect and attention is directed to amended Claim 1 and amended Figs. 3 & 4 that more succinctly describe an insert that is initially exposed to the gas-pressurized gas and the associated headspace within a container. Again, it is believed that the amendments to Claim 1 described above to address the indefiniteness rejection will alleviate this confusion.

Claim 1 requires three distinct openings that communicate with either the gas-pressurized liquid or the head space. Figs. 3 and 4 show an opening (10) that associates a cavity (8 or 9) of the body (4) with the headspace. The positioning device (11) includes a vent opening (5) that communicates with the headspace and an opening (3) that communicates with the gas-pressurized liquid. The insert initially floats on the liquid within the container. After the liquid is pressurized, the high pressure gas of the headspace will equalize with the lower pressure gas of the cavity (8 or 9). Concurrently with the pressurization of the cavity (8 or 9), fluid will fill the volume (11) where air previously trapped in the volume (11) escapes to the headspace via vent opening (5). Once the cavity (8 or 9) is filled to a predetermined level of fluid, the insert will sink into the liquid. The trapped gas in the cavity (8 or 9) will be released when pressure is reduced in the container by opening thereof. The sizing of the openings (3, 5 and 10) alone allow the contemplated inventions to function, i.e., no valves are needed.

Houzego, conversely, discloses a complicated system of tubes and a valve that are associated with a spherical body that does not employ three distinct openings. Houzego relies on orientation changes of the insert to perform venting and gas capture.

Furthermore, as will be described in detail below, Claim 1 has been amended to require that the body and the positioning device be cylindrical. The device of Houzego is spherical.

As Houzego does not disclose each and element of independent Claim 1, withdrawal of this rejection is specifically requested. In addition, Claims 2, 5, 6, 11-14, 16 and 18-21, which depend on allowable claim 1, are believed to be allowable as well.

#### **Claim Rejections – 35 U.S.C. §102 - Nash**

Claims 1, 2, 5, 6, 11-14 and 18-21 have been rejected as being anticipated by Nash. "A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." Verdegaal Bros. v. Union Oil Co. of California, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). Applicant respectfully traverses this rejection as Nash does not disclose each and every one of the elements claimed.

More specifically, Claim 1 has been amended to require that the body and positioning device be cylindrical. Support for this amendment may be found at least at the sentence that begins on page 12, line 12 that states " that the geometry of the insert according to the present invention may, of course, also be different, e.g., with a square, rectangular or polygonal horizontal projection, or also asymmetrical in relation to the axis x." In addition, one of skill in the art upon review of the figures will appreciate that a cylindrical insert is contemplated.

As Nash does not disclose each and element of independent Claim 1, withdrawal of this rejection is specifically requested<sup>1</sup>. In addition, Claims 2, 5, 6, 11-14 and 18-21, which depend on allowable claim 1, are believed to be allowable as well.

#### **Claim Rejections – 35 U.S.C. §103 – Houzego**

Claims 3, 4 and 10 have been rejected as being obvious in view of Houzego<sup>2</sup>. Obviousness requires a suggestion of all the elements of a claim: CFMT, Inc. V. Yieldup

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<sup>1</sup> The claimed configuration is not obvious in view of Nash, or Houzego for that matter, as altering the inserts of Nash or Houzego would render them useless for their intended purpose as they would not rotate as disclosed and claimed in those references.

Int'l Corp., 349 F.3d 1333, 1342 (Fed. Cir. 2003). As outlined above, Houzego does not teach a cylindrical insert with three openings, for example. Thus, Applicant requests withdrawal of this rejection as all of the elements of Claims 3, 4 and 10, which depend on Claim 1, are not found in Houzego.

#### **Claim Rejections – 35 U.S.C. §103 – Houzego and Grieshaber**

Claims 3, 4 and 10 have been rejected as being obvious in view of a combination of Houzego and Grieshaber. Obviousness requires a suggestion of all the elements of a claim. CFMT, Inc. V. Yieldup Int'l Corp., 349 F.3d 1333, 1342 (Fed. Cir. 2003). As outlined above, Houzego does not teach a cylindrical insert with three openings. Thus, Applicant requests withdrawal this rejection as all of the elements of Claims 3, 4 and 10, which depend on amended Claim 1, are not found in Houzego. The new elements of Claim 1 are also not found in Grieshaber. Furthermore, Applicant traverses the Examiner's assertion that Houzego and Grieshaber are analogous art. That is, one concerned with beverage container arts would not look to a complicated valve for a ballast tank for inspiration.

#### **Claim Rejections – 35 U.S.C. §103 – Houzego and Reichinger**

Claims 7-9 and 22-25 have been rejected as being obvious in view of a combination of Houzego and Reichinger, which has been cited for disclosing a multi-compartmented device. Obviousness requires a suggestion of all the elements of a claim. CFMT, Inc. V. Yieldup Int'l Corp., 349 F.3d 1333, 1342 (Fed. Cir. 2003). As outlined above, Houzego does not teach a cylindrical insert with three openings. Thus, Applicant withdrawal this rejection as all of the elements of Claims 7-9 and 22-25, which depend on amended Claim 1, are not found in Houzego. The new elements of Claim 1 are also not found in Reichinger.

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<sup>2</sup> It is believed that the Examiner may have meant Claim 1 is obvious in view of Houzega as on page 15 of the office action it states that Houzego does not disclose elements of Claims 3, 4 and 10 that are found in Grieshaber.

### **Claim Rejections – 35 U.S.C. §103 – Houzego and Wright**

Claims 15 and 17 have been rejected as being obvious in view of a combination of Houzego and Wright, which has been cited for disclosing the claimed snap connection. Obviousness requires a suggestion of all the elements of a claim. CFMT, Inc. V. Yieldup Int'l Corp., 349 F.3d 1333, 1342 (Fed. Cir. 2003). As outlined above, Houzego does not teach a cylindrical insert with three openings. Thus, Applicant withdraws this rejection as all of the elements of Claims 15 and 17, which depend on amended Claim 1, are not found in Houzego. The new elements of Claim 1 are also not found in Wright.

### **Claim Rejections – 35 U.S.C. §103 – Nash**

Claims 3, 4 and 10 have been rejected as being obvious in view of Nash<sup>3</sup>. Obviousness requires a suggestion of all the elements of a claim. CFMT, Inc. V. Yieldup Int'l Corp., 349 F.3d 1333, 1342 (Fed. Cir. 2003). As outlined above, Nash does not teach a cylindrical insert with three openings. Thus, Applicant requests withdrawal of this rejection as all of the elements of Claims 3, 4 and 10, which depend on Claim 1, are not found in Nash.

### **Claim Rejections – 35 U.S.C. §103 – Nash and Grieshaber**

Claims 3, 4 and 10 have been rejected as being obvious in view of a combination of Nash and Grieshaber. Obviousness requires a suggestion of all the elements of a claim. CFMT, Inc. V. Yieldup Int'l Corp., 349 F.3d 1333, 1342 (Fed. Cir. 2003). As outlined above, Nash does not teach a cylindrical insert with three openings. Thus, Applicant requests withdrawal of this rejection as all of the elements of Claims 3, 4 and 10, which depend on amended Claim 1, are not found in Nash. The new elements of Claim 1 are also not found in Grieshaber. Furthermore, Applicant traverses the Examiner's assertion that Nash and Grieshaber are analogous art. That is, one concerned with beverage container arts would not look to a complicated valve for a ballast tank for inspiration.

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<sup>3</sup> It is believed that the Examiner may have meant Claim 1 is obvious in view of Nash as on page 21 of the office action it states that Houzego does not disclose elements of Claims 3, 4 and 10 that are found in Grieshaber.

### **Claim Rejections – 35 U.S.C. §103 – Nash and Reichinger**

Claims 7-9 and 22-25 have been rejected as being obvious in view of a combination of Nash and Reichinger, which has been cited for disclosing a multi-compartmented device. Obviousness requires a suggestion of all the elements of a claim. CFMT, Inc. V. Yieldup Int'l Corp., 349 F.3d 1333, 1342 (Fed. Cir. 2003). As outlined above, Nash does not teach a cylindrical insert with three openings. Thus, Applicant withdrawal this rejection as all of the elements of Claims 7-9 and 22-25, which depend on amended Claim 1, are not found in Nash. The new elements of Claim 1 are also not found in Reichinger.

### **Claim Rejections – 35 U.S.C. §103 – Nash and Wright**

Claims 15 and 17 have been rejected as being obvious in view of a combination of Nash and Wright, which has been cited for disclosing the claimed snap connection. Obviousness requires a suggestion of all the elements of a claim. CFMT, Inc. V. Yieldup Int'l Corp., 349 F.3d 1333, 1342 (Fed. Cir. 2003). As outlined above, Nash does not teach a cylindrical insert with three openings. Thus, Applicant withdrawal this rejection as all of the elements of Claims 15 and 17, which depend on amended Claim 1, are not found in Nash. The new elements of Claim 1 are also not found in Wright.

### **Conclusion**

Applicant also respectfully traverses the remainder of the Examiner's assertions as to what is disclosed in and/or taught by the cited prior art. That is, since the amendments and arguments made herein are believed to sufficiently address the rejections, any Examiner assertions not specifically addressed are not admitted as true. Furthermore, any arguments concerning motivation to combine, etc. not specifically put forth are not waived.

Based upon at least the foregoing, Applicant believes that all pending claims are in condition for allowance and such disposition is respectfully requested. In the event that a telephone conversation would further prosecution and/or expedite allowance, the Examiner is invited to contact the undersigned.

Respectfully submitted,

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